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Supreme Court of the United States

OCTOBER TERM, 1928

No. 519

WESTERN & ATLANTIC RAILROAD,
Appellant,

VERSUS

MRS. MARY E. HENDERSON,

AND

MARYLAND CASUALTY COMPANY,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY, APPELLEES.

The opinion of the Supreme Court of Georgia, which is appealed from, is found in the Record, beginning on page 23, and is reported in 144 S. E., p. 905, pamphlet No. 12. It has not yet been published in the Georgia official reports.

The opinion of the Court of Appeals of Georgia, which was affirmed by the Supreme Court of Georgia,

is reported in 36 Ga. App. on p. 679, and is found in the record on p. 174.

STATEMENT OF FACTS

This suit was brought in the Superior Court of Whitfield County, Georgia, by Mrs. Mary E. Henderson against the Western & Atlantic Railroad, for the death of the plaintiff's husband.

The decedent, J. C. Henderson, was killed at a public grade crossing over the defendant's tracks by a collision between a train of the defendant and the truck which the decedent, Henderson, was driving over the crossing.

Negligence was alleged as to the condition of the grade crossing, it being alleged that it was unsafe for vehicles to cross over and that the defendant had removed the ballast from the crossing before Henderson's death, and that the removal of the ballast left the crossties exposed and the rails projecting upward several inches, which condition caused the truck to stall, and, while so stalled, it was run upon by the train, and Henderson was killed.

Negligence was also alleged in the operation of the train, it being alleged that the train was run at a negligent speed; that the engineer failed to give certain signals required by the statutes of Georgia upon approaching grade crossings; that the engineer failed to keep a proper lookout and failed to exercise due care in approaching the crossing; and that the engineer also failed to check the speed of the train on approaching the crossing, or to make any effort to do so, but negligently accelerated the same.

By amendment, it was alleged that the engineer was near-sighted, and, in fact, about blind in one eye at the time of the collision.

Upon the first appeal of the case to the Court of Appeals of Georgia, the Court of Appeals, in 35 Ga. App. on p. 354, had this to say:

> "The evidence is in conflict, but we can not say that the jury were not authorized to find from the evidence a verdict in favor of the plaintiff; and if the sole assignment of error were as to the sufficiency of the evidence, the case would fall within the rule that, where there is some evidence to authorize a verdict approved by the trial judge, this Court is by law powerless to interfere."

The Court, however, upon this first appeal sent the case back because of an error in the charge of the judge to the jury.

Upon the last appeal, which is reported in 36 Ga. App. 679, the Court of Appeals held:

> "Under the facts stated above, the previous ruling of this Court that the plaintiff was entitled to a recovery has become the law of the case, and that ruling must be and is adhered to."

The Supreme Court of Georgia granted a writ of certiorari to the Court of Appeals of Georgia to test the constitutionality of what is known as the Georgia presumption statute, contained in section 2780 of the present Code of Georgia of 1910, to-wit:

> "A railroad company shall be liable for any damage done to persons, stock, or other property

by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The statute was held constitutional by the Supreme Court of Georgia, and the railroad appealed to this Court.

HISTORY OF SECTION 2780 OF THE GEORGIA CODE OF 1910.

This statute has been the law of Georgia for over sixty-six years. It was first enacted as section 2978 of the Georgia Code of 1862, its language then being identical with the language of all subsequent Codes adopted by the legislature, including the last Code of 1910.

HOW THE QUESTION AS TO THE CONSTITUTIONALITY OF THE PRESUMPTION STATUTE ARISES.

Code section 2780 of the Code was given in charge by the trial judge to the jury, and in the motion for new trial the appellant made the attack upon the charge of the court and the statute upon which it was based, claiming that the statute violated the Fourteenth Amendment of the Constitution of the United States, and, beginning on page 9 of appellant's brief, it is claimed that section 2780 violates the due process clause of the Fourteenth Amendment to the Federal Constitution in the particulars set out on page 9, and that it violates the equal protection of the laws clause

of the Fourteenth Amendment as set out on page 10 of the brief, and it is claimed that the charge of the court, which interpreted to the jury the statute as construed by the Georgia courts, was erroneous for the same reasons for which the statute was attacked as unconstitutional.

THE MEANING OF THE GEORGIA PRESUMPTION STATUTE AS CONSTRUED BY THE GEORGIA COURTS IS HERE SHOWN. IT DOES NOT ESTABLISH A RULE OF LIABILITY, BUT IS A RULE OF EVIDENCE DETERMINING WHAT PROOF SHALL MAKE OUT A PRIMA FACIE CASE, AND MAY ALSO BE CONSTRUED AS REGULATING THE BURDEN OF PROOF. THE RAILROAD IS ALLOWED THE FULLEST LATITUDE IN OVERCOMING THE PRESUMPTION AND IN SHOWING THE REAL FACTS, AND THE CASE IS DECIDED BY THE PREPONDERANCE OF THE TESTIMONY. IF THE UNDISPUTED EVIDENCE, WITH ALL REASONABLE DEDUCTIONS TO BE DRAWN THEREFROM, OVERCOMES THE PRESUMPTION, THE JUDGE MAY NONSUIT THE CASE, IF THIS APPEARS FROM THE PLAINTIFF'S EVIDENCE, OR MAY DIRECT A VERDICT FOR THE DEFENDANT IF IT APPEARS FROM THE WHOLE EVIDENCE, OR, IF THE FACTS ALLEGED IN THE PETITION FAIL TO SHOW NEGLIGENCE, OR INJURY AS THE PROXIMATE RESULT OF THE NEGLIGENCE, THE CASE WILL BE DISMISSED UPON DEMURRER. NO NEGLIGENCE PRE-

SUMED WHERE NO DUTY OF CARE OWING INJURED PERSON.

It will be observed that this section makes the railroad liable for the damage done by the running of the locomotives, cars, or other machinery of the company, or for damage done by any person in the employment and service of the company, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The State of Georgia has by statute the comparative negligence doctrine, somewhat like the doctrine of comparative negligence under the Federal Employer's Liability Act.

By section 4426 of the Code, it is provided:

> "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

In one of the earliest cases on this subject, which is the case of Central R. R. Co. vs. Brinson, 64 Ga., p. 478, the Supreme Court of Georgia said:

> "Thus it will be seen that, although the presumption is always against the company, yet it may rebut that presumption and relieve itself of damages by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; or it may show that the damage was caused by the plaintiff's own negligence; or it

may further show that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. Upon either of these grounds the defendant may rest his defense.

"But these rules of law will not cover the facts of every case, for it may be that both the plaintiff and the agents of defendant are at fault, and when they are, then, whilst damages may be recovered, they are to be diminished by the jury in proportion to the default attributable to the plaintiff for his want of ordinary care in avoiding the injury to himself."

The Supreme Court of Georgia has limited the presumption statute to cases where some duty is owing to the injured person, such as the duty towards travelers on grade crossings, the duty towards persons on adjoining highways, the duty towards passengers, or the duty towards any other person occupying any position with reference to the railroad which requires the use of ordinary care.

Where the injured person is at a place and is injured under such circumstances as that no duty of care is owing him by the railroad company, such as a trespasser upon the track, no presumption of negligence arises. In the case of Holland vs. Sparks, 92 Ga. on page 754, the court used the following language:

"Relatively to one to whom no diligence whatever is due, there can, in legal contemplation, be no negligence at all in causing him a personal injury. Where some degree of diligence is due to another, with reference to his personal safety, failure to observe that degree of diligence will be negligence as to that person. In other words, negli-

gence, relatively to the safety of any particular person, is the breach of some diligence due to him. When an action is brought for a personal injury, caused by the running of a locomotive or car of a railroad company, the presumption of negligence does not arise against the company unless it appears that, at the time of the injury, there was due from the company to the person injured some degree of diligence to prevent that injury. The burden of proving it owed no diligence is not upon the company, but the plaintiff must show that, relatively to the safety of the person injured, some diligence was due by the company. As soon as he does this, the presumption immediately arises that the company's negligence caused the injury; and in order to escape liability, it must rebut that presumption by showing the observance on its part of such diligence as was due. After much deliberation, we are satisfied that nothing, even in the broad language of section 3033 of the Code (of 1882, which is the same section now under consideration as 2780 in the Code of 1910), relieves the plaintiff, in cases of this character, from the necessity of showing that a duty of diligence, such as we have mentioned, existed; or imposes upon a railroad company the burden of proving, negatively, the contrary. A presumption of negligence is neither more nor less than a presumption that there was a breach of diligence. Such a breach could not, of course, be presumed in a case where it was affirmatively proved, as a matter of fact, that no diligence at all was due. If, therefore, it is incumbent on the plaintiff to make the duty of diligence, relatively to the person injured, appear, and he fails to do so, the case must stand upon the same footing, for as to what a plaintiff is required to show, 'that which does not appear does not exist.'

"When the presumption of negligence has once been raised against a railroad company under the section above cited, and the company satisfactorily shows that its agents exercised all ordinary and reasonable care and diligence to prevent the particular injury for which the action was brought, it establishes its observance of the diligence due by it. What will constitute the amount or kind of diligence which will be required as 'ordinary and reasonable' must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words just quoted are themselves relative terms, and what, under some conditions, would be ordinary and reasonable diligence might, under other conditions, amount to even gross negligence. For instance, for most purposes, running a passenger train through the country at a rate of twenty-five miles an hour would be safe, prudent and proper, while to run the same train at this rate over a crossing in a crowded city would amount to wantonness. The measure of diligence due, therefore, by a railroad company to any person is a relative one, and what is or is not due diligence must be arrived at in every case with reference to the surrounding circumstances and the relations which, for the time being, the company and the person in question occupied towards each other."

In the case just quoted, the deceased person was walking near the track of the railway company on its right of way, not at a public crossing and at a point where there was no path or roadway in customary use by pedestrians. When the defendant's train passed him, some of the cars were derailed and were hurled a distance of twenty feet away from the rail to where the deceased was, and killed him. It was held that no duty was owing to the deceased at this point, and that,

therefore, no presumption arose. The court differentiated the case from one where a person was injured on a crossing or some other place where he had a right to be and where the company should have expected his presence, and, in reference to such places, the court, on page 758 of the opinion, used the following language:

> "In running its trains, the company must necessarily expect to find people at road crossings, or at other points where they have a right to be or to travel, and hence it becomes its duty to regulate the speed of trains at such places as to avoid inflicting injuries."

In the case of Southern Ry. vs. Thompson, 129 Ga. 367, which was a case of injury to property by fire communicated by sparks from a locomotive, the court, in dealing with the presumption of negligence, used this language on page 370:

> "If the presumption arises, it must be rebutted by evidence; but this may be done by evidence drawn from the plaintiff or his witnesses, as well as by that introduced by the defendant."

In the case of Atlantic Coast Line R. R. Co. vs. Taylor, 125 Ga. 454, the court, on page 455, used the following language:

> "Error is assigned upon the following extract from the charge: 'It is incumbent upon the company, when the injury is shown to have been inflicted by it, to overcome that presumption by the introduction of evidence for your consideration.' This was an inaccurate statement of the law. The defendant may rely upon the evidence introduced by the plaintiff to overcome the presumption of negligence, if it tends to have that effect."

The presumption under the statute is only prima facie, and where the defendant, by uncontradicted evidence by witnesses who know the facts with certainty, rebuts that presumption, a verdict against the railroad is illegal and will be set aside, as see the case of Savannah, Florida & Western Ry. Co. vs. McConnell, 94 Ga. 352, where the court used the following language:

> "The plaintiff depended for a recovery solely upon the presumption of negligence which the law raises against a railway company. That the animals were killed by the defendant's train was admitted; but by the evidence of two witnesses for the company—the engineer and the fireman—who knew with absolute certainty the facts of the transaction, it was conclusively shown that the company and its servants in charge of the train were free from all negligence in the premises. So the legal presumption against the company was fully overcome."

The effect of the presumption of negligence is to establish the plaintiff's case prima facie, and it is not incumbent upon the defendant to defeat the presumption of negligence by undisputed evidence, but it can defeat that presumption by a mere preponderance of the testimony. In other words, the initial burden of proving the injury is upon the plaintiff to prove that injury by a preponderance of the evidence, but when that initial proof of injury is made, then the defendant is presumed to be negligent, and the burden is on the defendant to establish its freedom from negligence by a preponderance of the evidence. Of course, it is for a jury to say where the preponderance lies. The defendant may put up only one witness, but he may be

more credible and trustworthy than a dozen on the other side, and that may furnish the preponderance.

In the case of Murphy vs. Georgia, &c. Co., 146 Ga., on page 299 the court used the following language:

> "There was no error in charging, under the facts of this case, that 'when personal injury is shown to have been done by the cars of a railroad company, the presumption is against the company, but it may defeat a recovery by establishing, by a preponderance of the evidence, either of the following defenses: that its agents have exercised all ordinary care and reasonable diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence.'"

If, upon the plaintiff's evidence, it appears that the injury could not have occurred had the plaintiff exercised ordinary care, there is no presumption even of negligence, though the injury is caused by the running of a train, and a judgment of non-suit is proper. Parish vs. Western & Atlantic R. R. Co., 102 Ga. 285.

Even though the injury occurs at a public crossing, still, if the plaintiff's evidence shows that the plaintiff, by the use of ordinary care, could have avoided the consequences to himself of the defendant's negligence, if any, the plaintiff's case would be non-suited. In this case, it appeared that the injured person went to sleep on the track at a public crossing. Raden vs. Georgia R. R., 78 Ga. 47.

Similar rulings were made in Southwestern R. R. vs. Hankerson, 61 Ga. 114, where the plaintiff became drunk or insensible on the railroad track, and in Wilds vs. Brunswick & Western R. R., 82 Ga. 667, where the injured person was walking upon a track at night, not at a public crossing. The court said in this last case:

> "The homicide occurred at night, several hundred yards from any public crossing; and the only reason why there was any such unfortunate calamity was, that the company and the deceased were both attempting to use the track at the same time. The company had a right to its use; the deceased had none. There is no explanation whatever as to why he did not avoid the consequences of the company's negligence. That he could have done so by exercising the care of a prudent person is manifest."

The trial judge in the case at bar fully recognized the construction of this statute, as is shown by the Supreme Court decisions we have quoted. In the particular charge which is complained of in the present appeal, after telling the jury that when the injury occurred by the operation of a train, the presumption arises that the railroad company was negligent in the particulars specified in the petition, the judge said:

> "and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent," &c. See page 165 of the Record.

Further on in the charge, as appears from pages 168 and 169 of the Record, the judge said:

"In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission; that it resulted in the death of the plaintiff's husband, and that he could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence."

Further on page 169, the judge charged:

"If the defendant has shown that it and its employes exercised ordinary care and diligence in the particulars wherein negligence is alleged, the plaintiff cannot recover."

On page 171 the court charged as follows:

"The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualification already given you, that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition, and the burden thereupon shifts to the defendant company to show that its employes exercised ordinary care and diligence in such particulars.

"What is meant by the preponderance of the evidence is that superior weight of the evidence upon the issue involved, which, while not sufficient to wholly free the mind from a reasonable doubt, is yet sufficient to incline the mind of a reasonable and impartial person to one side of the issue rather than the other.

"In determining what weight you will attach to

> the testimony of any witness, you may look at his or her appearance on the stand, take into consideration their manner of testifying, their interest or want of interest in the case, their feeling, prejudice or bias, if anything of the sort has been made to appear, together with their opportunity of knowing the facts about which they testify, and their inducement, if any, to swear falsely."

The judge then proceeded to give various other rules for determining the credibility of the witnesses and the weight of the testimony.

THE PRESUMPTION STATUTE IN GEORGIA PRESENTS ONLY A RULE OF EVIDENCE AND A REGULATION OF THE BURDEN OF PROOF, AND DOES NOT DISPENSE WITH PROPER PLEADINGS. LAW AS TO PLEADINGS IN GEORGIA REQUIRES THE AVERMENTS OF NEGLIGENCE TO BE DISTINCTLY SET FORTH.

The Georgia presumption statute does not dispense with proper pleadings in negligence cases, in which proper averments of negligence are required to be made. South Georgia Ry. Co. vs. Ryals, 123 Ga. 330, and the body of the opinion on page 332.

The rule in Georgia requires that the plaintiff, in his petition, shall set forth the facts upon which his cause of action is based plainly and distinctly and in numbered paragraphs. Section 5538 of the Georgia Code of 1910 reads as follows:

> "All suits in the Superior Court for legal or equitable relief, or both, shall be by petition to the court, signed by the plaintiff or his counsel, plainly,

> fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed."

Section 5539 of the Georgia Code of 1910 reads as follows:

> "All such petitions shall set forth the cause of action in orderly and distinct paragraphs, numbered consecutively; and any averment distinctly and plainly made therein, which is not denied by the defendant's answer, shall be taken as prima facie true, unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information."

Under the Georgia requirements as to pleading, which in a spirit of fair play to the defendant require the plaintiff to set forth his cause of action fully, a plaintiff in a personal injury suit against a railroad is not relieved by the presumption statute from setting forth the specific acts of negligence which caused the injury. In other words, the defendant is still entitled to know the acts of negligence relied on, even though they may be made out prima facie by presumption. See Blackstone vs. Central, &c. R. R., 105 Ga. 380; Russell vs. Central, &c. R. R., 119 Ga. 705; Seaboard, &c. R. R. vs. Pierce, 120 Ga. 230.

This rule is in favor of the defendant and limits the effect of the presumption. The Georgia court was reconciling the two rules, one of which raised a presumption and the other of which allowed a plaintiff to recover only by specifying certain acts of negligence. In order to reconcile these two rules, the presumption raised against the railroad company must be held to be

limited to the averments in the petition. See Central, &c. R. R. vs. Weathers, 120 Ga. 475.

STATE STATUTE COMES BEFORE SUPREME COURT OF THE UNITED STATES WITH THE CONSTRUCTION UPON IT WHICH THE STATE COURTS HAVE PLACED UPON IT, SO FAR AS TESTING ITS CONSTITUTIONALITY IS CONCERNED.

It is familiar law that the construction of a state statute by the state court governs, where the constitutionality of that statute is up for consideration. See the following cases: Gatewood vs. North Carolina, 203 U. S. 531; Board of Education vs. Illinois, 203 U. S. 553; Smiley vs. Kansas, 196 U. S. 447.

APPELLANT'S CONTENTION THAT GEORGIA PRESUMPTION STATUTE CREATES A RULE OF LIABILITY UNDER CERTAIN GEORGIA AUTHORITIES, ANSWERED. THE GEORGIA AUTHORITIES RELIED ON BY DEFENDANT ARE DISCUSSED, AND IT IS SHOWN THEY DO NOT OPERATE AGAINST THE MEANING OF THE STATUTE, AS HEREINBEFORE CONTENDED FOR IN THIS BRIEF.

Appellant quotes the case of Central, &c. Ry. Co. vs. Hartley, 25 Ga. App. 110, on page 13 of the brief, as showing that when an injury by the running of cars occurs, a presumption of liability arose against the defendant, "unless the company should make it appear that its agents had exercised all ordinary and reason-

able care and diligence, the presumption in all cases being against the company."

This is merely repeating the language of the statute, and does not in any way detract from the proposition that it is only a presumption which is dealt with, and a presumption of liability amounts to no more than a presumption of negligence, because the negligence would create the liability and it is a mere question of phraseology, without any difference in meaning.

The case of Western & Atlantic R. R. vs. Dobbs, 36 Ga. App. 516, quoted on page 14 of appellant's brief holds that where damage is done by a railroad company, the company is liable unless it makes it appear that their agents have exercised ordinary care and diligence, &c., and that "there arises, upon proof of injury to a person by a servant of a railroad company, not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury."

This only amounts to saying that a presumption of negligence amounts to negligence, according to the legal definition of that term, negligence being an utterly irrelevant fact unless it proximately produces the injury. In other words, the presumption goes to the extent of presuming negligence causing the injury. There is nothing remarkable about this. The presumption would amount to nothing unless the negligence was the cause of the injury, as we have hereinbefore stated.

If, from the facts stated in the petition or appearing in the evidence, the negligence is unrelated to the in-

jury, the court can strike the averment from the petition or the evidence from the record.

The case of Central &c. Ry. Co. vs. Barnett, 35 Ga. App. 528, quoted on pages 15 and 16 of the brief, merely reiterates the proposition that when the plaintiff carries the burden of proving the injury by the operation of the defendant's cars, that the defendant has the burden on it of showing by a preponderance of the evidence its defense.

The case of Payne, Agent vs. Wells, 28 Ga. App. 29 is quoted on page 17 of defendant's brief, and holds, in substance, that the presumption against railroads arises from injury by the running of the cars, and that the presumption is that the defendant was negligent in the particulars alleged in the petition, and that it is not error for the court, in stating the issues to the jury in his charge, to refer to all of the acts of negligence charged, although some of them may not be sustained by the evidence and may be even disproved by undisputed evidence.

To understand the full meaning of the Wells decision just quoted, it is necessary to explain the law of Georgia in reference to the way negligence cases are tried and submitted to the jury.

In Georgia, the judge is prohibited from expressing any opinion upon what has, or has not, been proved, and it is reversible error to do so, as see Code of Georgia of 1910, section 4863, which provides:

> "It is error for any or either of the judges of the superior courts of this state, in any case, whether civil or criminal, or in equity, during its

progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused," &c.

The section then proceeds to provide that for any such violation, the judgment below shall be reversed.

When a case is submitted to the jury on an issue of negligence, whether against a railroad or any other person, the question of whether the particular facts constitute negligence or not must be left to the jury by the judge in his general charge.

In Harris vs. Central R. R., 78 Ga. 525, the court, on pages 535 and 536 of the decision, held that what ordinary care required on part of a plaintiff or a railroad under the particular facts of the case were questions for the jury, the court saying on page 536:

"These were all questions for the jury, under the special circumstances. They are questions of fact rather than of law, because diligence has to be determined in view of the conditions, the special conditions, existing at the time the conduct under investigation took place; and the standard of decision for ordinary diligence is the conduct of a man of ordinary prudence under like circumstances. That standard is supposed to be in the minds of the jury; and it is the standard in the minds of the jury with which the conduct involved in the particular case is to be compared. That same standard may be in the mind of the judge, and he may be more competent to make the comparison; yet the law does not permit him to make it. He has no more to do with it than if he had no standard at all. He has no more to do with the determination of a question of diligence in a particular case than if he did not know and could not find out what would be the conduct

> of a man of ordinary prudence in such circumstances. He must simply refer it to the jury. He must tell them what the standard is; that is, give the description of it which the law gives."

Further on, the court, after giving the definitions of slight, ordinary and extraordinary diligence which the judge must give the jury, closed the opinion with these words:

> "But beyond this he cannot go, unless there is some statute to lead and conduct him."

If a motion, however, is made to direct a verdict or for a non-suit, then the judge must decide at least as to whether the presumption is entirely removed as to all of the averments of negligence. If the presumption is removed by the undisputed evidence as to all of the averments of negligence, then the judge can either grant a nonsuit or direct a verdict. Code section 5926; Hall vs. Western & Atlantic R. R., 123 Ga. 213; Holland vs. Sparks, 92 Ga. 753.

Inasmuch as the judge can not express an opinion on the facts in his charge to the jury, he is much more circumscribed than he is in making a ruling on a demurrer to the petition, or on a motion for non-suit, or on a motion to direct a verdict. The presumption in a railroad case having established prima facie the negligence of the defendant in all the particulars specified in the petition, if the proof does not remove beyond dispute the effect of the presumption as to all of the averments, the judge can neither handle it by the direction of a verdict or a non-suit. The case must be submitted to the jury, and, in that event, the judge could not express the opinion to the jury that this or

that averment of negligence had been removed by the proof, according to the Wells case, but would tell the jury that if the preponderance of the evidence established that such averments of negligence were not true, that then they should not be considered. The defendant is not in any way hurt, because the jury is presumed to heed the instructions of the court and, notwithstanding the court may, in his recital of the issues in his charge, call over all of the acts of negligence alleged as mere averments in the pleadings (as was done in the Wells case, 28 Ga. App. 29), yet, when he gives the jury the rule by which they determine the issues, which is a preponderance of the evidence, the jury will readily dispose of those averments not supported by the evidence.

The appellant, in calling attention to the charge in the Wells case, does not go to the root of the whole matter, because the charge there set forth was constrained by the Georgia rule limiting the power of the judge in his charge as the Court of Appeals viewed it. The rule in Georgia on this subject is set forth in the case of Jarrett vs. Atlanta & West Point R. R. Co., 83 Ga. 347, the rule being stated in the body of the opinion on page 350, as follows:

> "2. But it is claimed by counsel for the plaintiff in error that, this being a case wherein negligence was alleged, it was the duty of the court to submit the question of negligence to the jury, and that it was unlawful for him to pass upon that question himself. That is true after the case has been submitted to the jury, but we know of no law that prohibits a trial judge from passing upon this question when it is made in a motion for nonsuit, or on demurrer to the declaration, as was

done in this case. When a motion for a nonsuit is made, or a demurrer to the declaration filed, it is the duty of the trial judge to pass upon it. If, however, the case is submitted to the jury without a motion to nonsuit, or a demurrer to the declaration, then the court must leave the question of negligence to the jury, and it is forbidden by law for the court to express any opinion upon the subject, when it is solely a question of fact. And this is the distinction between the cases cited by counsel for the plaintiff in error, which hold that negligence is a question for the jury, and those cited by counsel for defendant in error, which hold that the judge can grant a nonsuit, or sustain a demurrer upon the facts alleged in the declaration."

The case of Payne vs. Wells, 28 Ga. App. 29, merely dealt with a case where the judge, in stating the issues to the jury, referred to all the averments of negligence in the plaintiff's petition, it being claimed by the defendant that some of the allegations were not sustained by any evidence or were disproved by undisputed evidence. The court held that the presumption arose in the case and that the presumption was sufficient primarily, to prove the negligence alleged, and that in such case it was not error for the judge to refer to all of the acts of negligence, although some of them might be disproved by undisputed evidence.

The case of Georgia Railway & Electric Co. vs. Bailey, 9 Ga. App. 106, headnotes 6 and 7, holds that it is not error in the judge, in charging the jury, to refer to the acts of negligence alleged, and that no complaint can be made that the acts of negligence were not proved.

These two cases, so far as we can find, are the only

cases holding such doctrine in Georgia. They are, as before stated, predicated upon the idea that, as the trial judge can not express or intimate any opinion upon what has or has not been proved, and as questions of negligence, especially, are for the jury to find under the particular facts, the court giving only the standards of care, that the judge would be invading the jury's province if, in charging the jury, he told them that the presumption on any one averment was overcome by the evidence. This would be equivalent to holding that the witnesses testifying against the presumption were credible, and would also be equivalent to holding that the facts to which they testified showed no negligence, and would thus be an invasion of the jury's province.

Every state has its peculiarities, or, if we may say it, its eccentricities in practice, and unless these peculiarities or eccentricities invade some provision of the Constitution of the United States, the state is free to indulge in them. If the evidence, without conflict, overcomes the presumption, the court, on a motion for nonsuit, or on a motion to direct a verdict, can decide this question, as is shown by numerous cases which we have hereinbefore quoted.

If the alleged negligence in the petition shows on its face that it is not the proximate cause, or if the facts alleged to constitute negligence can by the judge be said, as matter of law, not to be negligence, because fanciful, or against the laws of nature, or otherwise, then the matter can be reached by demurrer under various decisions which we have heretofore quoted. So the defendant has a full remedy to reach every case.

The thing which differentiates the railroad case from other cases is that, in the railroad case, the presumption is established by law, which has the effect, primarily, of evidence. Once established, that the presumption, and the classification of railroads as being subject to the presumption, is valid, as does the Turnipseed and other cases in this court, and it follows that the judge, in charging the jury in a state where he is so limited, as in Georgia, must submit the sufficiency of the evidence to overcome the presumption to the jury.

However, the dictum of the Court of Appeals in the two cases of Wells and Bailey has never been held to be law by the Supreme Court of Georgia, which is our highest Appellate Court. We have two divisions of the Court of Appeals, which is an intermediate appellate court, as it is subject to review in the Supreme Court of Georgia by writ of certiorari under much the same rules as the Supreme Court of the United States grants writs of certiorari. It would be remarkable if, in the large number of cases decided, there would not occasionally be found some dictum which is not entirely in accord with the decisions of the Supreme Court.

The language in the Wells case that if there be uncontradicted evidence on some averments of negligence in the defendant's favor, that the judge may not withdraw that averment from the jury, or at least not refer to it in his statement of the issues, has never been held by the Supreme Court of Georgia, but, on the contrary, the Supreme Court and the Court of Appeals, in other cases, have held the opposite.

In the case of Savannah R. R. Co. vs. Phillips, 90 Ga. 829, the suit was against a railroad by an em-

ployee injured by a derailment alleged to be caused by negligence. The defendant requested a charge that if a certain examination appeared as to the condition of the engine, which had been alleged to have been out of repair, that then the presumption of negligence from the derailment and the injury of the plaintiff would be removed. The court held it was for the jury, and not the court, to decide what condition the engine was in, what sort of examination, if any, was made, and whether the legal presumption had been removed. The court, on page 837, held that the requested instruction grouped together certain facts, and asked the court as matter of law to declare that such facts showed due diligence on part of the railroad, and that the court rightly refused so to charge. The court then went on to say:

> "It may be that instances might arise where a certain state of facts, fully established and uncontradicted, would unequivocally be sufficient to remove the presumption of negligence raised by the law against a railroad company, and in such case it might not be erroneous or improper for the court to so instruct the jury; but this power should be exercised with extreme caution, and the court should never invade the province of the jury by deciding questions of fact which should properly be left to them for determination."

Following the suggestion of the Supreme Court in the Phillips case as to an uncontradicted state of facts, the Supreme Court, in Southern Ry. vs. Chitwood, 119 Ga. 28, held in a case for killing stock, where the plaintiff claimed the killing occurred in the day and the railroad claimed that it occurred at night and put up its engineer and fireman, who showed due diligence on

part of the night train,—that it was proper for the court to charge that if it occurred at night, there could be no recovery, as the evidence of the fireman and engineer, without contradiction, showed due diligence, and the court quoted another case in which this expression was used:

> "When an alleged fact is entirely unsupported by evidence, the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case."

In the case of Shields vs. Georgia Ry. & Electric Co., 1 Ga. App. 172, the plaintiff, by an amendment to the petition (the same being a suit by a passenger against a railway company for injuries sustained by the motion of the car in starting before she had sufficient time to alight), alleged as cause of her injury, a high step, which allegation was not sustained by the evidence, and it was held that the court was not required to submit that issue to the jury, the language of the court being as follows:

> "Neither was the court required to submit such question to the jury, in view of the positive evidence by the plaintiff that such negligence had nothing at all to do with her injury. 'While a judge is forbidden to express or intimate his opinion concerning a question of fact about which there is any doubt whatever, he may with propriety say to the jury that there is no evidence to support an alleged fact, when such statement is unquestionably true'; and when an allegation is entirely unsupported by the evidence, 'the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case.'"

Murphy vs. Georgia Ry. &c. Co., 146 Ga. 297, quoted on page 17 of appellant's brief; Georgia &c. Ry. vs. Thornton, 144 Ga. 381; Ellenberg vs. Southern Ry., 5 Ga. App. 389, quoted on pages 18 and 19; and Western & Atlantic R. R. vs. Thompson, 144 S. E. 831, quoted on page 19,—do not require any specific mention other than that they apply the general rule that the presumption arises, when injury occurs from the operation of the train, that the defendant is negligent in the particulars charged in the petition.

THAT THE GEORGIA PRESUMPTION AS TO INJURIES BY RAILROADS BY THE RUNNING OF THE TRAINS IS A VALID PRESUMPTION, HAS BEEN SUBSTANTIALLY HELD BY THIS COURT IN FOUR CASES, TO-WIT: MOBILE, JACKSON, &C. R. R. VS. TURNIPSEED, 219 U. S. 35; EASTERLING LUMBER CO. VS. PIERCE, 235 U. S. 380; ATCHISON &C. R. R. VS. MATTHEWS, 174 U. S. PAGE 96; AND HAWKINS VS. BLEAKLY, 243 U. S., PAGE 210.

In the Turnipseed case, 219 U. S. 35, a Mississippi statute was under consideration which created a presumption against railroads where damage occurred from the running of cars, and which reads as follows:

> "Injury to persons or property by railroads prima facie evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to

such injury. This section shall also apply to passengers and employes of railroad companies."

The attack made in the Turnipseed case upon the Mississippi statute was that the railroad companies are put into a class to themselves and deprived of the benefit of the general rule of law, which places upon one who sues in tort the burden of not only proving injury but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.

This court, through Justice Lurton, held that the statute was valid; that the law of evidence was full of presumptions; that presumptions of fact were disputable; that the statute did not deny the equal protection of the law or otherwise fail in due process of law because it created a presumption of liability; that its operation only supplied an inference of liability, in the absence of other evidence contradicting such inference; that it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed; and the conclusion was reached that the application of the act to injuries resulting from the running of locomotives and cars was not an arbitrary one but rested upon considerations of public policy, and the Mississippi law was sustained.

The Pierce case, 235 U. S. 380, likewise involved the Mississippi statute, and the validity of that statute was upheld in a memorandum opinion.

In the case of Atchison &c. R. R. Co. vs. Matthews, 174 U. S. p. 96, a Kansas statute was before the court, which provided that, in an action against a railroad for

damage by fire caused by operating the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof shall be prima facie evidence of negligence on the part of the railroad. This statute was sustained by this Court as not being in conflict with the Fourteenth Amendment to the Federal Constitution.

The state is not only supreme over presumptions, but supreme over rules respecting the burden of proof, as is shown in the case of Hawkins vs. Bleakly, 243 U. S. 210.

In this Hawkins case, an employer's compensation law provided that an employer rejecting the compensation features of the act could not escape liability for personal injuries sustained by an employe because the employe assumed the risk, or because the employe was negligent, or because the injury was the result of intoxication and the like, and that in an action against an employer it would be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut such presumption. Here was a case which went much further than the case at bar in presuming negligence, and which changed the burden of proof. The court, on page 213, said:

> "The same may be said as to the provision that, in an action against an employer who has rejected the act, it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and

of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself, and not conclusive of the rights of the party, does not constitute a denial of due process of law."

LAWS RAISING PRESUMPTIONS OF NEGLIGENCE AGAINST RAILROADS FROM THE FACT OF INJURY HAVE BEEN FREQUENTLY SUSTAINED, AND IT IS FOR THE STATE TO SAY, UNDER ALL SUCH STATUTES, HOW FAR THE BURDEN OF PROOF MAY BE CHANGED AND THE EFFECT OF THE PRESUMPTION. THE ONLY REQUIREMENT UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION IS THAT THE PRESUMPTION BE NOT UNREASONABLE OR ARBITRARY AND THAT IT SHALL NOT BE CONCLUSIVE.

Statutes providing that the happening of an accident through a defect in the locomotives, cars and machinery or attachments of railroads shall be prima facie evidence of negligence in actions for injuries brought by employes are not unconstitutional. Pennsylvania &c. Co. vs. McCann, 54 Ohio State p. 10, in which case the court say:

> "There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its legislative department necessarily has authority, limited only by the constitutional guarantees respecting due process of law, vested rights, and the inviolability of contracts."

Statutes making railroads liable for damages resulting from accidents or collisions, unless the railroad shows that the precautions prescribed by statute were performed, are constitutional. Louisville &c. R. R. vs. Burke, 46 Tenn. (6 Coldwell) 45.

In Baltimore R. R. vs. Tripp, 175 Ill. 251, s. c. 51 N. E. 833, a statute of Illinois, which created a presumption of negligence generally against a railroad from fire communicated by its trains to property, was sustained as against the constitutional objection here made, and in that case the court went into an elaborate argument to show that such matters were more peculiarly within the knowledge of the defendant, and it was reasonable to put the burden upon it.

Florida has identically the same statute as Georgia, the Florida statute evidently having been copied from the Georgia statute, as see the Florida General Statutes of 1906, section 3148, the same being also found in Chapter 4071 of the Acts of 1891, the first two sections of which Act are brought into the General Statutes of 1906 as sections 3148 and 3149. This statute has been given effect in several Florida decisions, notably in Atlantic Coast Line R. Co. vs. McCormick, 52 So. Rep. 714; Warfield vs. Hepburn, 57 Southern 618.

In South Carolina, there is also a presumption by law against a railroad of negligence from injury by the operation of a train. In Griffith vs. Atlantic Coast Line, 64 S. E. 222, s. c. 82 S. C. 252, it was said in the third headnote that a railroad company killing stock on the track is subject to a presumption of negligence, and where it assumes the burden of proving due care and offers evidence overcoming the burden, the jury

must rest their verdict not on the presumption alone but on the preponderance of the entire evidence.

In McKittrick vs. Greenville Traction Co., 70 S. E. 414, it was held that the presumption of negligence on the part of the carrier arising from the fact of injury to a passenger through the carrier's instrumentality continues throughout the trial of the case.

THERE CAN BE NO DOUBT BUT THAT A STATE CAN NOT ONLY RAISE THE PRESUMPTION OF NEGLIGENCE FROM AN INJURY FROM THE RUNNING OF A TRAIN, BUT THE STATE CAN ALSO CHANGE THE BURDEN OF PROOF, AND, HAVING RAISED THE PRESUMPTION, CAN PUT THE BURDEN OF PROOF UPON THE DEFENDANT, WHICH ONLY MEANS THAT THE DEFENDANT MUST ESTABLISH ITS FREEDOM FROM NEGLIGENCE BY A PREPONDERANCE OF THE EVIDENCE.

In Minneapolis &c. R. R. vs. State of Minnesota, 193 U. S. 53, it was held that a railway company was not deprived of its property without due process of law by reversing the ordinary rule and putting the burden of proof upon it in a proceeding to require it to establish a railroad station. In that case, the Supreme Court held that the only complaint was that the burden of proof was shifted from the municipality to the railroad, "and therefore the court, in deciding that the railroad company had not overcome the prima facie case arising from the statute, did not decide a Federal question" (this is what the lower court held). The Supreme Court held that it was within the province of

Minnesota to require railroads to provide proper stations, and that the Commission had the power to do so and that it could put the burden on the defendant of showing no necessity. The decision, on page 63, says:

> "To make it prima facie so by statute and to impose the burden of meeting the presumption thence arising, certainly does not amount to an invasion of the rights of property or an unreasonable control of property."

In the case of James Dickinson Co. vs. Harry, 273 U. S. on page 124, this court held:

> "It is well settled that a State may consider proof of one fact presumptive evidence of another, if there is a rational connection between them (citing Hawes vs. Georgia, 258 U. S. 1), and also that it may change the burden of proof (citing authorities)."

The case of Schlesinger vs. Wisconsin, 270 U. S. 230, quoted on page 24 of appellant's brief, made all gifts within six years prior to the death of the testator conclusively presumed to be in contemplation of death. The presumption was declared to be conclusive. As the court on page 239 said, "The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

The case cited by appellant of James Dickinson Farm Co. vs. Harry 273 U. S. 119, already referred to, sustained a Texas statute which provided that, as to a certain class of promise, the fact that it was violated raised a presumption that it was falsely and fraudulently made, and the burden was on the party making

it to show that the promise was made in good faith but that he was prevented from complying with it by the act of God, the public enemy or some equitable reason, and the statute was sustained.

A legislative presumption may be given an artificial value to some extent. Simply because the presumption in some instances may not concide with the facts is no reason why the legislation should not exist. In the case of Yee Hem vs. United States, 268 U. S. on page 184, which involved a statute making possession of opium presumptive evidence to authorize conviction of concealing opium and requiring an explanation of the possession to the satisfaction of the jury, this Court said:

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute."

It will be observed that the act of Congress there sustained required the defendant to explain the possession "to the satisfaction of the jury." This was practically a reversal of the burden of proof. To establish a thing to the satisfaction of the jury certainly must be by the preponderance of the testimony. If the legislature, in enacting a presumption, can go so far as to provide that the reply to it must go so far as to satisfy the jury of its truth, then it certainly has the effect of

evidence, and the presumption is certainly a factor that remains in the case until it is overcome to the satisfaction of the jury.

The foregoing authorities holding that the state is supreme over such questions as reasonable presumptions and burden of proof render it unnecessary to discuss the technical question of whether the railway company can have the burden of proof as to negligence shifted to it, or has merely the burden of the evidence as some of the authorities hold.

As is stated in 22 C. J. 67, there is some confusion over the phrase "burden of proof" and mere "burden of the evidence," the burden of proof referring to the necessity of finally establishing a fact in issue and the burden of evidence representing an ordinary incident of temporarily shifting the burden during the contest. The burden of proof, ordinarily, in a civil case must be made out by a mere preponderance of the evidence. In the case at bar, as appears from the charge of the court, the initial burden was on the plaintiff to show by a preponderance of the testimony the injury by the running of the train, and the burden of course always remained on the plaintiff to show the amount of her damage, but, as to the issues of negligence, the burden was shifted under the Georgia statute when the injury by the running train was shown, and, that the state can shift it and require the defendant to rebut it by a preponderance of the evidence, there can be no doubt. Of course, the railway might put up only one witness who knew all of the facts, and, if he were credible, the railroad would carry the preponderance. As was charged by the judge below, the preponderance did not necessarily rest with the greater number of witnesses,

but it was a matter for the jury to decide, under all of the facts and circumstances of the case, where the greater weight of the evidence was. Certainly, the presumption, if the state legislature so enacts, can as well remain until it is overcome by a preponderance of the evidence, as when any evidence at all is introduced.

IN APPELLANT'S BRIEF IT IS CONTENDED ON PAGE 26 THAT DUE PROCESS OF LAW IS NOT FIXED AND IMMUTABLE BUT CHANGES WITH THE TIMES, THAT THE AUTOMOBILE HAS REVOLUTIONIZED THINGS, THAT A RULE MAY HAVE BEEN VERY WELL FOR HORSE AND BUGGY DAYS BUT IS ABSURD TODAY, AND, ON PAGES 35 AND 36, THAT THE AVERAGE DRIVER OF AN AUTOMOBILE DOES NOT STOP, LOOK AND LISTEN, AND CONSTANTLY VIOLATES ROAD AND SPEED RESTRICTIONS AND RULES AND THAT AUTOMOBILES ARE ENGAGED IN THE CARRIER BUSINESS JUST AS ARE RAILROADS. THESE POSITIONS ANSWERED.

The Turnipseed case, 219 U. S. page 35, was decided in 1910 at a time when automobiles were in pretty general use, so the argument of a change in conditions is without force.

If a statute is constitutional when adopted, as this statute was in 1862, railroads then being unlike any other form of locomotion or transportation, could changing conditions which bring in other rival means of transportation make it unconstitutional? In other

words, can a thing constitutional when adopted become, by changing conditions and scientific discoveries, unconstitutional? This has never yet been held in the history of this country, so far as we are aware.

But there is no such change in conditions as would justify any such contention. The railroad is still the largest and most powerful of all land power-propelled vehicles; it still runs on an iron track.

The automobile uses the place formerly used by the horse. It has crowded the horse out of its highway almost entirely, but the railroad still maintains its own right of way and its own track, and runs as formerly. Not only that, but the advent of the automobile has added a greater element of danger to the operation of railroads over grade crossings, and the reason for the presumption it would seem, if danger be the criterion, is greater.

Courts take judicial cognizance of matters of common observation and of history, and, to some extent, even of current events.

When the Georgia presumption law was enacted in 1862, practically the only power propelled vehicles were locomotives. All other vehicles were horse drawn. There can be no doubt but that even at this day the locomotive and the train are much larger and heavier than other vehicles which carry on the commerce of the country, and that, in crossing our public highways with their tracks, they are heavier and more dangerous than any others which cross that track on the highway. The engine carries fire and steam which are, unless controlled, dangerous elements.

Therefore, the train is much more liable to do injury
coming into contact with some other object than
receive injury. As it is the most powerful and
angerous of machines, and as its operation is entirely
the hands of the employes of the railway company,
would seem reasonable that explanations for in-
ries should come from the railroad.

When a collision occurs between a train and an au-
mobile, it must be that in the great majority of cases
e or the other is at fault. It is clearly within the
risdiction of the state to say which party, prima
cie, is at fault. We deny the claim that in the ma-
rity of instances the automobile is at fault, but, even
this should be the case in the majority of instances,
n not the legislature still raise the presumption?

Is not the consideration that great danger attends
e operation of these trains, and that mere contact
ith other vehicles or with persons will produce in-
ries to such other vehicles or persons, sufficient rea-
n for putting the burden on the railway of explain-
g its diligence? The railway has the means at hand,
rough its employes, of explaining the transaction.

As between citizens who are armed and others who
e not armed, the heavily armed man should be more
rticular. As between those who, in their ordinary
nctioning, are liable to inflict damage as compared
ith those who are not so liable, the former should be
ore particular, and the law should be more exacting
requiring explanations in cases of injury. In other
ords, the one who is more liable to inflict the damage
ould have the burden of explanation, rather than
who is to receive the damage. To put such a burden

on him will make him more particular. He has the means of explanation at hand, and if he was not at fault, he can show it, and hence no harm is done. The one who is to receive the damage has the incentive of protecting himself from hurt and injury to make him particular and careful. He knows that from contact with a train he will be the sufferer. Those operating the train are practically immune from injury. In case of collision or contact with others, the train and its crew are not likely to be the sufferers. Therefore, as their instinct of self-preservation can not be relied on to make them careful, the train crew must be deemed negligent by the law, and the burden put on the railway in the way of a presumption of negligence to explain its exercise of care.

Is not the right in the state absolute, in cases where one of two parties is bound to be at fault, to determine and decide only the prima facie question of who is at fault, and leave the explanation to the one most liable to inflict the injury? Is it not in line with good legislation to put the burden on him who is able to show the facts and who uses the dangerous instrumentality to make the explanation?

REPLY TO APPELLANT'S CONTENTION THAT MISSISSIPPI STATUTE WAS LIMITED TO CASES WHERE EMPLOYES OR PASSENGERS SUED—WE SAY THE STATUTE WAS NOT SO LIMITED—BUT EVEN IF IT WAS SO LIMITED, THERE IS NO DIFFERENCE IN PRINCIPLE BETWEEN RAISING PRESUMPTION IN FAVOR OF PERSON INJURED AT GRADE CROSSING OR ELSEWHERE, WHERE A DUTY WAS OWING TO

HIM, AND AN INJURY TO A PASSENGER OR EMPLOYE

There can be no doubt but that the Mississippi statute sustained in the Turnipseed case, 219 U. S. p. 35, applied as broadly as does the Georgia statute to persons on grade crossings and to all other persons to whom the railroad company owed the duty of some care. We deny, therefore, the soundness of appellant's contention on page 30 of its brief that the Mississippi statute is limited to passengers and employes.

The Mississippi statute has been hereinbefore quoted, and provides that, in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury; and it further provides that this section shall also apply to passengers and employes of railroad companies.

When the Mississippi statute was before this Court in the Turnipseed case, it came up with numerous decisions of the Mississippi courts construing it to apply to persons and property other than passengers and employes. We quote the following cases, all decided previous to the year 1910, when the Turnipseed case was decided, as showing the general application of the statute to injuries other than employes and passengers, to-wit: New Orleans &c. R. R. Co. vs. Bourgois, 66 Miss. p. 3, 5 So. 629, decided in 1889; Roberts vs. Mobile &c. R. R., 74 Miss. 334, 21 So. p. 10, decided in 1896; Hamlin vs. Yazoo &c. Co., 72 Miss. 39, 16 So.

877, decided in 1894. We quote also the following more recent cases as continuing the same construction of the statute as did the cases before 1910, to-wit: New Orleans &c. R. R. vs. Wilkes, 85 Miss. 269; Billingsley vs. Illinois &c. R. R., 100 Miss. 612; and Alabama &c. R. R. vs. Thornhill, 106 Miss. 387, 63 So. 674, which latter was an injury to a man standing on the railroad track at a street intersection, the injury being inflicted by a running train, and the presumption being applied, and in which case most of the Mississippi cases were examined.

We say, therefore, that the Turnipseed decision, in sustaining the Mississippi statute, sustained a statute almost precisely like the Georgia statute, and which applied the presumption certainly to all persons to whom the railroad owed any duty of care.

In the body of the decision, Judge Lurton used the following language:

> "The objection made to this statute is that the railroad companies are thereby put into a class to themselves, and deprived of the benefit of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.
>
> "It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employes of such companies; second, to injuries arising from the actual operation of railway trains or engines; and third, the effect of evidence showing an injury due to the operation of trains or engines is only

'prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury.'

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common-law aspects of the subject, see Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co., 1 L. R. A. (N. S.) 533, 71 C. C. A. 316, 139 Fed. 528 et seq.

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. A few of the leading ones are Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668; 34 N. E. 759; Horne v. Memphis & O. R. Co. 1 Coldw. 72; Meadowcroft v. People, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Com. v. Williams, 6 Gray 1; State v. Thomas, 144 Ala. 77, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744."

In using this language, we do not think the court meant to say that the statute was limited to employes and passengers. The statute provides that the presumption arises "in all actions against railroad companies for damages done to persons or property" by the running of trains, &c. It then provides in a separate sentence: "This section shall also apply to passengers

and employes of railroad companies." The language "all actions" would cover everybody as to whom the railroad could be negligent. Certainly, it could be negligent as to any person anywhere to whom it owed a duty.

The words "This section shall also apply to passengers and employes of railroad companies" were evidently an addition after the original act was drafted, because of some doubt as to whether passengers and employes were covered without this additional language. The word "also" shows that passengers and employes are added to another class already covered by the act.

The language of Judge Lurton in stating that the operation of the statute is limited, first, to injuries sustained by passengers or employes; second, to injuries arising from the actual operation of railroad trains or engines,—was not, in our opinion, intended to limit the right of action to passengers or employes, especially as the Mississippi courts had not so done. The court, in saying, first, the action was limited to injuries sustained by passengers or employes, meant that passengers and employes were covered generally by the act, and secondly, that all other injuries to all other persons were covered by the language making the railway liable for injuries arising from the actual operation of railway trains or engines.

But, even if the Mississippi statute was intended to be limited to passengers and employes, the principle of the decision sustaining that statute would have authorized the application of that statute to any person to whom the railroad owed a duty of care.

Why should the right to raise a presumption be limited to passengers or employes? The railroad sustains numerous relations to other persons, both by contract and—if we may say it—by contact. The railroad company, in crossing grade crossings with its track, comes in touch with the public. The rights of the railroad and the public on grade crossings are said by many decisions to be co-equal, although the railroad (as charged by the judge below in this case on page 166 of the Record) "has the right of way and the traveler must wait until the imminently approaching train, the coming of which he knows, has passed."

A suit by a passenger is not an action on a contract; neither is a suit for an injury to an employe; and hence the claim that there may be some distinction between the right to raise a presumption in favor of employes and passengers, while there is no such right as to other persons to whom the railroad owes an equal duty, is without any sound foundation.

The relation of employer and employe raises only the duty to exercise ordinary care in respect to those things as to which the master owes the duty to the employe. The passenger is owed a degree of extraordinary or utmost care. The violation of this duty of care to either passenger or employe gives rise to an action for tort.

A person on or near a grade crossing is entitled to the exercise of ordinary care. The laws of Georgia require certain signals to be given by the railroad company and certain measures of lookout and other measures of diligence. What is the difference in principle between raising a presumption of negligence in case

of injury to a passenger, to whom extraordinary care is owed, or to a member of the public on a grade crossing, or anywhere else, to whom ordinary care is owed? There can, of course, be no negligence unless there is some duty to observe care, and it would seem reasonable that the presumption of negligence can be raised in any case where there is a duty to exercise care. The distinction, then, made by the appellant in its brief between passengers and employes, on the one hand, and third persons, on the other hand, is a distinction without a difference, and to hold, as does the Turnipseed case, according to appellant's contention, that the presumption can be extended to employes and to passengers, is to hold that it can be extended to shippers whose goods are lost, or to members of the public injured on grade crossings, or to any other case where the railroad company may be negligent. Certainly, the test as to whether such a law can be passed as to railroad companies depends upon the question as to whether, in the case before the court, negligence of the railroad company could exist in the transaction. If so, such negligence can be presumed. It is a mere arbitrary classification to say as to one class of persons to whom a duty of care is owed, the presumption of negligence may be raised, and as to another class to whom the same degree of care is owed, it may not be presumed. The railroad is just as peculiar an individual in its relation to third persons injured by the running of its trains as it is to its passengers and its employes. It can just as well be classified as to injuries to third persons on public crossings and the like as a peculiarly dangerous occupation or business as it can be to its passengers or its employes. Just so the person is injured by the operation of the trains and machinery of

the company, it is sufficient. It is that operation by a railroad of its trains and machinery that differentiates it from other concerns, and this is the basis of classification, and that classification touches the relations of that railroad to every one liable to be injured by the operation of those trains and to whom some duty of care is owed.

We have quoted cases in this Court in which state statutes raised presumptions against railroads where fire was caused by the operation of trains. In such cases, the property owner sustained no relation by contract to the railroad. The property owner was a mere third person who was close enough to the railroad to be injured by the operation of its train, and hence the maxim *sic utere tuo ut alienum non laedas* applied. It was sufficient that the railroad owed a duty to those people owning nearby lands not to injure them, and, on the basis of owing this duty, the state could raise a presumption of negligence from the happening of the injury.

As hereinbefore stated, while the employe may sustain his relation to his employer under a contract, the duty of the employer not to hurt him or to exercise care towards him in the ways specified by law arises from the relation and is not a suit on a contract. The contract is mere matter of inducement creating a relation out of which a duty of ordinary care springs. The action is not brought on the contract but for the breach of duty and the duty is fixed by law.

APPELLANT'S CLAIM THAT GEORGIA STATUTE CREATES A RULE OF LIABILITY AND NOT OF EVIDENCE (APPELLANT'S BRIEF

PAGES 9 AND 10) IS ANSWERED BY THE GEORGIA DECISIONS HEREINBEFORE QUOTED, WHICH EXPRESSLY SAY THAT THE STATUTE IS ONLY A RULE OF EVIDENCE, AND CREATES ONLY A PRIMA FACIE LIABILITY, AND IS ALSO ANSWERED BY THE LANGUAGE OF THIS COURT IN THE TURNIPSEED CASE. ALSO THE STATE CAN CHANGE THE BURDEN OF PROOF.

As to the claim made that the Georgia statute creates a rule of liability and not of evidence, we have already quoted the language of that statute, which makes the defendant liable unless it makes it appear that its agents and servants have exercised all ordinary care and diligence, and provides that "the presumption in all cases is against the company." This language would seem to dispose of the contention that a rule of liability is fixed.

But we have hereinbefore quoted numerous Georgia decisions holding that only a rule of evidence is set out in our presumption statute; that it does not dispense with proper pleadings and proper averments of negligence; that the plaintiff's own evidence may answer the presumption, and that when the presumption is raised, the defendant may rebut it by a mere preponderance of the evidence.

But this same argument was made in the Turnipseed case, and was answered by this court in the following language, which fits the case of the Georgia statute completely, to-wit:

> "We are not impressed with the argument that the supreme court of Mississippi, in construing the

act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

"The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference."

APPELLANT'S CLAIM THAT THERE WAS ONLY A SHADOW OF PROOF TO SUSTAIN AVERMENTS OF THE PETITION, THAT IT WAS NOT REQUIRED THAT THE NEGLIGENCE SHOULD BE THE CAUSE OF HENDERSON'S DEATH IN ORDER TO WARRANT A RECOVERY, AND THAT THE JURY WERE NOT SO CAUTIONED,—ANSWERED.

On page 12 of appellant's brief, it is contended that there were ten averments of negligence in the petition and no evidence to support seven of them, and that there was only a shadow of proof to sustain the averment of improper maintenance of the track.

We do not think this court will undertake to look into the evidence to decide that question, where the Georgia Court of Appeals has held that there was evidence to sustain the averments of negligence in the petition. This is not a case under the Federal Employer's Liability Act, where this court can examine the evidence to find whether a case of liability exists. This is an attack upon a statute of a state as being unconstitutional.

In reply to the claim that the jury were not cautioned that the averments of negligence in the petition must be the proximate cause of the injury, we quote the following from the charge of the court on page 167 of the Record, to-wit:

> "I charge you that the duty rested upon the railroad company to maintain its crossing in a reasonably safe condition for those who used it in the exercise of ordinary care, and a failure to discharge this duty would constitute negligence on the part of the railroad company; and if such negligence existed, and if such negligence was the *proximate cause* of the death of the plaintiff's husband, she would be entitled to recover, unless by the exercise of ordinary care he, the husband, could have avoided the consequences to himself of such negligence."

Again, on pages 168 and 169, the judge charged:

> "In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission, *that it resulted in the death of the plaintiff's husband*, and that he

could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence."

Thus, we see that the judge charged the jury clearly that the defendant's negligence must have been the proximate cause of the death.

APPELLANT'S COMPLAINT THAT THE GEORGIA PRESUMPTION IS NOT ONLY ONE OF NEGLIGENCE BUT OF NEGLIGENCE WHICH IS THE PROXIMATE CAUSE OF THE INJURY,—ANSWERED. THE PRESUMPTION OF NEGLIGENCE WOULD DO NO GOOD UNLESS THE NEGLIGENCE SHOULD BE THE PROXIMATE CAUSE OF THE INJURY. A PRESUMPTION OF NEGLIGENCE NOT CAUSING THE INJURY WOULD BE A FUTILE PRESUMPTION. THE DEFENDANT CAN NOT ONLY REBUT THE PRESUMPTION OF NEGLIGENCE BUT CAN REBUT THE PRESUMPTION THAT THAT NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY. IN DOING ONE, IT ALMOST INEVITABLY DOES THE OTHER, BECAUSE, AS WILL BE HEREINAFTER SHOWN, NEGLIGENCE ALLEGED IN THE PETITION OR SHOWN IN THE TESTIMONY WHICH DOES NOT STAND RELATED TO THE INJURY IS STRICKEN FROM THE PLEADINGS OR THE EVIDENCE AND IS NOT TO BE CONSIDERED.

When the Mississippi statute under consideration in the Turnipseed case, supra, provided that proof of in-

jury inflicted by the running of the cars of the company "shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury," it necessarily meant that the negligence presumed was negligence which contributed to the injury, otherwise, the statute would be wholly irrational. It would be absurd to say that the statute presumed negligence unless the negligence caused the injury.

All through the discussion of the Turnipseed case, this court assumed that there was a presumption not only of negligence, but a presumption that the negligence caused the injury. This court said: "It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation."

To say that the derailment "is due to some negligence," is the same as saying that negligence is the proximate cause of the injury or derailment. It is axiomatic that, unless the negligence is the proximate cause of an injury, it is not actionable. Surely, these statutes presume actionable negligence, and that is all that is involved in the question of proximate cause.

Under another heading in this brief, we will show that in Georgia the question of whether negligence alleged in a petition is the proximate cause can be raised either by a demurrer to the petition, or by objection to evidence at the trial, or can be controlled in the charge of the court. Georgia recognizes the doctrine of proximate cause as fully as any state, and leaves it as an open question in any case where the evidence is pro-

duced. This was illustrated by the charge of the judge in the court below.

THE APPELLANT'S OBJECTION THAT MERE PROOF OF COLLISION AND DAMAGE CREATES PRESUMPTION THAT AVERMENTS OF NEGLIGENCE IN PETITION ARE TRUE, AND CREATES PRESUMPTION OF CAUSAL CONNECTION OF SUCH NEGLIGENCE WITH THE INJURY, AND THAT THE PRESUMPTION IS GIVEN THE FORCE OF SUBSTANTIVE TESTIMONY,—ANSWERED.

As to the last objection stated in the heading made on page 15 of appellant's brief, all presumptions are given the effect of substantive evidence and may be weighed by the jury against actual testimony.

In the case of Hawes vs. Georgia, 258 U. S., p. 1, Georgia's prohibition act made the existence of distilling apparatus prima facie evidence that the person in actual possession of the premises had knowledge of the apparatus. The claim was made that this presumption was unconstitutional, but the court held that the presumption alone would justify a conviction in the absence of an attempt to deny or explain, and we apprehend that a denial or explanation might be so weak that it would avail nothing against the presumption. Hence, the presumption necessarily has the effect of substantive testimony. If it did not have, no evidence would be required against it. It would not be a presumption. Suppose utterly incredible and unbelievable testimony were introduced in response to a presumption such as was raised in the Hawes case.

This court has held in the case of Quock Ting vs. United States, 140 U. S. 417, as follows:

> "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony."

Here is a case in which a mere presumption would prevail against such unreasonable and incredible testimony.

The Georgia law gives full remedy to the defendant to exclude from the case by special demurrer or by objection to testimony any averments or evidence of negligence which could not be properly considered as negligence, or which could not be properly considered as the proximate cause of the injury.

We have already quoted sections 5538 and 5539 of the Georgia Code, which required all petitions to plainly, fully and distinctly set forth the plaintiff's charge, ground of complaint and demand, and to set the same forth in distinct and orderly paragraphs.

That the presumption has the weight of evidence, and that the fact in dispute remains to be determined on a consideration of all of the evidence, including the presumption, has been held by numerous courts. The fact of the injury by the running of the train here has considerable probative value. The very considerations which moved the legislature to make it presumptive evidence of negligence would have considerable weight with the jury, irrespective of the presumption fixed by statute.

The case of Pacific Portland Cement Co. vs. Reinecke, 158 Pac. 1041 (30 Cal. App. 501), was a suit against the defendant as endorser of certain notes held by the plaintiff. The endorser claimed no consideration for the notes and that he endorsed the same after the notes had been delivered to the plaintiff. The court held that there was a presumption that the note was endorsed for consideration, and that the endorsement was made at the time and place of making the note, and that the burden was on the defendant to prove the contrary. The question was as to whether, after evidence was introduced showing no consideration and that the endorsement was made after the plaintiff had the notes,—as to whether the presumption still had weight. The court said on page 1043 of 158 Pacific Reporter:

> "The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor may be resorted to in aid of the findings, even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence, including the presumption (citing authorities). Therefore, giving all the weight and credence contended for by counsel for the defendant to the evidence adduced in support of the defense made, there still remains a substantial conflict in the evidence which, under the familiar rule, can not be availed of upon appeal to disturb the findings of the trial court."

In Rauer's Law & Collection Co. vs. Harrel, 162 Pacific 125 (32 Cal. App. 45), the action was upon a promissory note, to which evidence of lack of consideration was pleaded, and the question was between the presumption of consideration for the note and the evidence showing no consideration. The lower court had charged that disputable presumptions, while evidence, are the weakest and least satisfactory, and are allowed to stand not against the facts but in lieu of proof of them, and that when the facts are proved contrary to the presumption, no conflict arises, that the presumption is simply overcome and dispelled. The Appellate Court, in dealing with this instruction, on page 136 of 162 Pacific, said:

> "This instruction, in its substance, was taken from Ruth v. Krone, 10 Cal. App. 770, 773, 103 Pac. 960. It was not there said that disputable presumptions are evidence the weakest and the least satisfactory. As a proposition of universal application this is not true. It was pointed out in Hitchcock v. Rooney, 171 Cal. 285, 289, 152 Pac. 913, that disputable presumptions 'have such force as may in some cases outweigh positive evidence against them * * * and sometimes such presumptions as we are here considering require clear and convincing evidence to overcome them.'"

A RAILWAY COMPANY CAN NOT COMPLAIN THAT TO EXTEND PRESUMPTION OF NEGLIGENCE TO AVERMENTS OF PETITION WOULD SUBJECT IT TO FANCIFUL AVERMENTS OF NEGLIGENCE, OR AVERMENTS OF NEGLIGENCE WHICH DO NOT PROXIMATELY CONTRIBUTE TO THE INJURY, OR AVERMENTS OF NEGLIGENCE WHICH

ARE DISCONNECTED WITH THE INJURY; THE DEFENDANT, EXERCISING ITS RIGHT UNDER GEORGIA LAW, COULD STRIKE ANY SUCH AVERMENT FROM THE PETITION, AS GEORGIA LAW AUTHORIZES SPECIAL AND GENERAL DEMURRERS TO PETITIONS IN WHICH AVERMENTS OF NEGLIGENCE ARE UNWARRANTED BY THE NATURE OF THE CASE, OR DO NOT CONSTITUTE THE PROXIMATE CAUSE, OR FOR ANY OTHER REASON SHOULD NOT BE LEGALLY CONSIDERED.

It is the rule in Georgia that negligence, to be the basis of a recovery, must be the proximate cause of an injury. See Platt vs. Southern Photo Material Co., 4 Ga. App. 159; Johnston vs. Enterprise Manufacturing Co., 130 Ga. 143; Shaw vs. Mayor and Council of Macon, 6 Ga. App. 306; Shields vs. Georgia Railway & Electric Co., 1 Ga. App. 172; Burnett vs. Rome Railway & Light Co., 7 Ga. App. 323; Seaboard Air Line Rwy. vs. Smith, 3 Ga. App., page 1.

There being no causal connection between an act of leasing land and homicide by the lessee's servant, there is no case. Compton vs. Seaboard Air Line Rwy., 145 Ga. 255; Central of Georgia Rwy. Co. vs. Price, 106 Ga. 178.

The allegations of a petition must be sufficient to withstand a demurrer on the ground that the negligence alleged is not the proximate cause, and in the case now being quoted the demurrer was overruled but the principle quoted recognized. City of Columbus vs. Anglin, 120 Ga. 785.

The court, on a demurrer, will pass on the question of whether the negligence alleged is the proximate cause. See Bowen vs. Smith Hall Grocery Co., 141 Ga. 721.

Any substantial imperfection in the pleadings in Georgia may be reached by a general demurrer without particularizing. See Douglas, Augusta & Gulf Rwy. Co. vs. Swindle, 2 Ga. App. 550.

The practice of determining issues on a general demurrer where the petition is bad is commendable in Georgia, says the Court of Appeals, for it saves expense and time. See Lewis vs. Amorous et al, 3 Ga. App. 53.

On the hearing of general demurrers to petitions, the pleadings are construed most strongly against the pleader. Krueger et al vs. MacDougald, trustee, 148 Ga. 429.

Unjustified opinions or conclusions of the pleader are not authorized in Georgia, and may be reached by demurrer. See Southern Rwy. Co. vs. Covenia, 100 Ga. 46.

Allegations of fact in a petition in Georgia which are impossible are not admitted by a demurrer. Southern Rwy. Co. vs. Covenia, 100 Ga. 46.

A demurrer in Georgia does not admit an alleged fact which is a physical impossibility. Rome Railway & Light Co. vs. Keel, 3 Ga. App. 769, 773.

Facts which are not issuable are not admitted by a demurrer in Georgia. Williams vs. Stewart, 115 Ga. 864; Smith vs. Usher, 108 Ga. 231.

Facts which are contradicted by legislative acts, or by records of which the court takes judicial notice, are not admitted by demurrer in Georgia. Griffin vs. The Augusta & Knoxville R. R., 72 Ga. 423.

Of course if the petition, upon its face, sets forth no cause of action, a general demurrer reaches the defect. Douglas, Augusta & Gulf Rwy. Co. vs. Swindle, 2 Ga. App. 550; Lewis vs. Amorous, 3 Ga. App. 53; Jarrett vs. A. & W. P. R. R., 83 Ga., p. 347.

Inconsistent allegations in a petition may be reached by special demurrer. Ney & Commins vs. Clere Clothing Co., 5 Ga. App. 327.

Evasiveness in a petition may be reached by a special demurrer. Mayor and Council of Eastman vs. Cameron, 111 Ga., p. 110.

Irrelevant matter may be stricken by special demurrer. Lampkin vs. Garwood, 122 Ga. 407.

It will be seen from the foregoing rulings that there can be no possible merit in any contention that, because the presumption in Georgia extends to the averments in the petition, the defendant will thereby be subjected to fanciful, irrelevant, or immaterial allegations. The defendant, by exercising its rights under the statute, can restrict the averments of negligence to such as are material, relevant and are disclosed to be the proximate cause of the injury.

In the case of Rome Ry. & Light Co. vs. Keel, 3 Ga. App. 769, the court, in the opinion on page 773, used the following language:

"A party will not be permitted to maintain in his pleadings a contradiction of those things of which the court is required to take judicial cognizance. Of the primary physical laws the courts must take notice. 16 Cyc. 854 (8). Therefore the the pleading is demurrable when it sets up a contradiction of these laws. Since a physical impossibility can not exist at all, it can not be admitted even by demurrer. Such an allegation must be treated by the courts just as they would treat an allegation that what is not law is law, i. e., it must be wholly disregarded. Therefore the court erred in not sustaining the general demurrer. Compare McEwen v. Atlanta Ry. Co., 120 Ga. 1008."

As showing that the court is as free in construing the averments of a petition as it would be in considering evidence of acts of negligence brought out in the evidence, we quote the following from the case of Cedartown Cotton Co. vs. Miles, 2 Ga. App., p. 79, our quotation being from the body of the opinion on pages 80 and 81:

"Our Civil Code, section 4960, requires that the plaintiff, in his petition, shall plainly, fully, and distinctly set forth his charge, ground of complaint, and demand. As construed by the courts of this State, this statutory provision requires a higher degree of certainty in pleading than was necessary at common law; but the object to be attained is the same under both systems, to wit, that the pleadings be understood by the party, the jury, and the court. They certainly ought to be so certain and full that the court may look to the allegations of fact and know whether a cause of action is set forth or not. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a

demurrer can not properly be used to compel him to do so; but all the facts necessary to be stated should be set forth plainly, and special demurrer will compel this. In negligence suits, in order that the court may determine from an inspection of the pleading whether a cause of action is set forth, each fact necessary to raise the duty and to show the specific breach thereof, or the specific wrong inflicted, should be plainly and unequivocally stated; and enough of the details of each element of the case should be set out to clearly distinguish the transaction as an actionable one and not to leave it doubtful whether it is or not."

If the evidence in the case discloses the whole transaction, it is necessarily inconsistent with any theory save that shown by the evidence. In such cases averments of the petition not sustained by the evidence are eliminated in the charge of the judge, if such averments do not constitute the direct and proximate cause of the injury. We quote upon this proposition the following language from the case of Shields vs. Georgia Ry. & Electric Co., 1 Ga. App., p. 172, the language we quote being from the body of the opinion on page 174, to-wit:

"It was incumbent upon the plaintiff not only to show that she was injured by the negligence of the defendant, but that such injury was the direct and proximate consequence of the negligence alleged against the defendant; for, to constitute an actionable tort, there must be damage to the plaintiff and negligence by the defendant, causing the injury. Atlanta Consolidated Street Railway Co. v. Owings, 97 Ga. 663; Central Railroad v. Freeman, 75 Ga. 331. In this case, the plaintiff's own evidence utterly negatives the allegations in her amendment as to the cause of her injury."

We contend, therefore, that the claim that extending the Georgia presumption of negligence to the averments of a petition subjects the defendant to illegal or fanciful or unjustifiable charges of negligence is without any foundation. When the Georgia law says that the defendant is presumed to be negligent in the particulars charged in the petition, it means negligence in the legal acceptation of that term. Negligence, when alleged in the petition, is to be considered and looked at just as if the facts described as negligence in the petition had appeared in the evidence. They are not immune from attack as being real averments of negligence. Any criticism can be made upon the averments in the petition, just as if they were in the evidence. The plaintiff, in his petition, may fail to show actionable negligence, just as his evidence may wholly fail to show it, and the court has full control of the subject, notwithstanding the presumption.

The law requiring the plaintiff to expose his claims of negligence in his petition is entirely in the defendant's favor, as it enables the defendant to make any just attack upon those allegations which the law would authorize.

We say, therefore, the appellant can not complain that the presumption subjects it to fanciful or imaginary averments of negligence, or averments of negligence which are not the proximate cause of the injury. The averments are contained in the petition, and the petition can be purged of all such matter. The defendant has a complete remedy by demurrer, as we have shown by the foregoing decisions, to reduce the allegations of negligence to only those which stand related to the injury, and which are real and not fanciful

and which might be held by a jury to be negligence under proper definitions of negligence.

Really, the defendant is complaining of rules made entirely in its favor and for its benefit. Unless the presumption should be restricted to the averments of the petition, it would cover every conceivable and imaginary kind of negligence which the human mind could picture. The defendant would never know when it was through with answering the presumption of negligence. That there might be some limit to the plaintiff's claims is the reason for requiring them to be distinctly and fully stated in the petition, and that the plaintiff might not make fanciful, imaginary or unrelated claims of negligence is the reason why the Georgia law allows the defendants such full liberty by special and general demurrer of purging the petition of all allegations save those which the court can say proximately contributed to the injury and might be held by the jury to be negligence under the proper definitions of that term.

DEFENDANT'S CONTENTION THAT MISSISSIPPI STATUTE CONSTRUED IN TURNIPSEED CASE CREATED A MERE REBUTTABLE INFERENCE WHICH ENDED AS SOON AS PROOF WAS INTRODUCED,—ANSWERED. SUCH ARGUMENT ADMITS THAT THE RAISING OF THE PRESUMPTION OR INFERENCE IS VALID, BUT OBJECTS TO THE EFFECT GIVEN IT IN GEORGIA IN CHANGING THE BURDEN OF PROOF.

Beginning on page 30 of appellant's brief, two Mis-

sissippi cases are cited, and the argument is made that these cases show the Mississippi statute construed in the Turnipseed case created a mere rebuttable inference relating to a matter peculiarly within the railroad's knowledge; that, as soon as proof was introduced, the inference ended, and the presumption could therefore not weigh against actual testimony; that such a rebuttable inference was valid when there was some rational connection between the fact proved and the ultimate fact presumed.

The Mississippi statute created a presumption of negligence from an injury by the running of the trains. The Georgia statute does the same thing.

If it is admitted that the presumption can be raised at the initial stage, that ends the question as to whether there is some rational connection between the fact proved and the ultimate fact presumed. At this stage of the controversy, we are not dealing with the question of how difficult it would be to remove the presumption, but we are dealing with the mere raising of the presumption and not its effect. Therefore, the appellant's argument on page 30 is a practical concession that, to start with, a presumption of negligence can arise from an injury by the running of a train on a railroad. It would seem that no one could doubt that the Turnipseed decision holds this much.

But the appellant claims that the Mississippi statute could be sustained because the courts of that state hold that, as soon as proof is introduced, the inference ends and that the presumption could not be weighed against actual testimony.

If the injury from the running of trains can fairly raise a presumption of negligence, then it should not, as matter of law, be dissipated the instant any testimony is taken against it. The testimony introduced may be utterly incredible on its face. The witness who gives the testimony may be utterly unworthy of belief and impeached by every mode known to the law; and could it be said that, merely because such evidence is introduced that this, as matter of law, would dissolve the presumption? The case would be in a bad fix under such circumstances if the jury did not believe the actual evidence introduced, and could not rely upon the presumption.

Georgia courts do not give any such construction to the presumption. We submit that the effect given to the presumption is a matter for state legislation, so long as the presumption is rebuttable and yields to the testimony, and we submit that requiring the defendant to rebut the presumption by a mere preponderance of the testimony,—a mere tipping of the scales in favor of the defendant,—could not in any way detract from the validity of the presumption.

We submit that the Georgia rule is the only rational rule following out the creation of this presumption, the Georgia rule being that the injury by the operation of the cars raises the presumption but the burden placed upon the defendant to remove the presumption is only a very slight one and can be done by a mere preponderance of the evidence, and this may be even the evidence of the plaintiff himself.

Thus, the Georgia rule having raised the presumption, consistently follows out the proposition by placing

the burden upon the party against whom the presumption is raised to make the evidence preponderate in his favor on that issue. If the defendant introduces some evidence explaining the transaction and covering all of the averments of negligence, and the plaintiff does not reply, then a verdict may even be directed by the judge. If the plaintiff replies to the defendant's evidence upon the subject of negligence, then the question of determining whether there was negligence is for the jury, the burden being upon the defendant to establish its position by a preponderance of the evidence. The plaintiff, of course, had to make out his case originally by a preponderance of the evidence in showing his injury by the running of the train, but, when that fact is shown, the burden shifts. Surely, this is a matter for state regulation.

The construction of the Mississippi statute in the two cases quoted of Columbus, &c. R. R. vs. Fondren, 145 Miss. 679, and Gulf, &c. R. R. vs. Brown, 138 Miss. 39, is slightly different from the construction given the Georgia statute. But, whether the Mississippi court's construction is sound or the Georgia courts' construction is sound, we submit that, in either event, it is a matter for state regulation and is equally valid in both cases.

The only difference between the effect given the statute in Mississippi and in Georgia is that the presumption in Georgia changes the burden of proof. We submit that this is a perfectly permissible difference. It only goes one step further than raising the presumption in the first instance. In Mississippi, after the presumption performs its purpose, the plaintiff is still required to prove all of his averments of negli-

gence. In Georgia, the presumption remains in the case only to the extent of changing the burden of proof, and putting the onus upon the defendant of establishing by a preponderance of the evidence the truth of its defense.

We have already quoted cases from this court holding that not only can the state raise a presumption in a proper case, but that the state has full power to change the burden of proof.

IF THE PRESUMPTION IS VALID, AS THE COURTS OF GEORGIA HAVE HELD IT TO BE, AND AS WE CONTEND THE FOUR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES HELD IT TO BE, THEN RAILROADS CAN BE PROPERLY CLASSIFIED FOR THIS LEGISLATION, AND, IF THEY CAN BE PROPERLY CLASSIFIED, THEY ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

We have already discussed fully the due process of law proposition, and we think that discussion really covers the claim that the railroad is denied the equal protection of the laws.

The only claim as to a denial of equal protection of the laws is summed up on page 37 of defendant's brief in the proposition that unproven averments of negligence are, as a matter of law, dropped from consideration by a jury except in collision cases against railroads.

If the presumption is properly raised against railroads, then they are properly classified to themselves,

and the fact that the same presumption is not raised against others can make no difference. The denial of equal protection of the laws could only exist in the event the classification of railroads for this presumption statute was void, in the first instance, as violating the due process of law clause. Really, the claim that the legislation does not give due process and that the railroad is denied the equal protection of the laws rests upon the same proposition, for, if the railroads are of such a distinctive nature that they can be classified for purposes of this presumption, then they are given the equal protection of the laws if all railroads are treated alike.

Respectfully submitted,

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